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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 195

RICHARD H. CLINTON,
Petitioner,

v.

THE INTERNATIONAL ORGANIZATION OF MASTERS, etc.; HARRY W. STEWART, DIRECTOR OF EMPLOYMENT, STATE OF CALIFORNIA,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT STATE OF CALIFORNIA IN OPPOSITION

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	7
A. The District Court Lacked Jurisdiction Over the Purporting Subject Matter of the Ninth Cause of Action Within the Proceeding as the State of California, or Its State Agencies or Officers, Cannot Be Made a Party Without Prior Consent and Which Consent Has Not Here Been Given	7
B. The Petitioner Has Not Sought State Judicial Review of a State Final Administrative Decision Involving Payment of Unemployment Insurance by the State of California and Where the State Has Provided by Statute for Such Judicial Review	9
C. The Petitioner Is Not a Merchant Seaman as to the Subject Matter of the Ninth Cause of Action. The District Court Properly Held That There Was No Jurisdiction in Admiralty as to the Ninth Cause	12
D. The Ninth Cause of Action Is Fictitious, Groundless, and Sham. The Ninth Cause Is a Repetition of a Previous Suit Involving These Same Parties and the Same Subject Matter in the Same District Court, There Numbered 18837-WM, Which Was Determined Adverse to the Petitioner Clinton	13
CONCLUSION	16
APPENDIX	
1. Section 1094.5 California Code of Civil Procedure	17
2. Applicable sections of the California Unemployment Insurance Code	19
3. Referee's Decision LA 6934, dated March 11, 1955	21
4. Benefit Decision No. 18321, August 26, 1955, by the California Unemployment Insurance Appeals Board	24

AUTHORITIES CITED

CASES

Page

Alabama Public Service Comm. v. Southern Railway Co., 341 U. S. 341, 95 L. Ed. 1002 ..... 9, 10

Ashdown v. Department of Employment 135 Cal. (2) 291 11

Byer v. Arguello, 94 Cal. App. (2) 110 14

California v. Southern Pac. Co., 157 U. S. 229 8

Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 81 L. Ed. 1245 9

Crowley v. Modern Faucet Mfg. Co., 44 Cal. (2) 321, 282 Pac. (2) 33 15

Cunha v. Anglo California National Bank of San Francisco, 34 Cal. App. (2) 383, 93 Pac. (2) 572 14

Dixon v. Duffy, 342 U. S. 33, 96 L. Ed. 46 11

Duhne v. New Jersey, 251 U. S. 311, 64 L. Ed. 280 ..... 7, 8

Fitts v. McGhee, 172 U. S. 516, 524 8

Ford Motor Co. v. Department of Treasury, 322 U. S. 721, 88 L. Ed. 1560 8

Gillum v. Johnson, 7 Cal. (2) 744, 62 Pac. (2) 1037 9

Great Northern Life Ins. Co. v. Read, Inc., Com'r. of Oklahoma, 322 U. S. 47, 88 L. Ed. 1121 ..... 8, 9

Grossett Lumber Co. v. McGain, 170 S. W. (2) 674 11

Hans v. Louisiana, 134 U. S. 1 8

Moore v. Bureau of Unemployment Compensation, 73 Ohio Appeals, 362, 56 N. E. (2) 520 11

North Carolina v. Temple, 134 U. S. 22 8

Palmer Oil Corp. v. Amerada Petroleum Corp., 342 U. S. 35, 96 L. Ed. 47 10

People ex rel Stone v. Jefferds, 126 Cal. 296, 58 Pac. 704 14

Rishel v. McPherson County, 34 Fed. (2) 250 15

Snowden v. Hughes, 321 U. S. 1, 88 L. Ed. 497 11

Standard Dredging Corporation v. Murphy, 319 U. S. 306, 87 L. Ed. 1416 13

Steward Machine Company v. Davis, 301 U. S. 548, 81 L. Ed. 1279 9

AUTHORITIES CITED—Continued

CASES—Continued

Page

Tally v. Unemployment Compensation Division, 63 Ida. 644, 124 Pac. (2) 784 11

Weidenfeld v. Pacific Improvement Co., 101 Fed. (2) 699 15

Worcester County Trust Company v. Riley, Controller of California, 302 U. S. 292, 82 L. Ed. 268 8

STATUTES

California Code of Civil Procedure

Section 1094.5 ..... 2, 19

California Unemployment Insurance Code

Section 1253(c) 4, 20, 21, 22, 23

MISCELLANEOUS

9 Calif. Jurisprudence 505 14

18 Corpus Juris 1180 14

49 Corpus Juris 701 14

6 American-English Encyclopedia of Pleading and Practice 910 ..... 14, 15

28 U. S. C. 1254 (1) 2

Benefit Decision 18321, Case No. 26733 3

U. S. Constitution, Article 3, No. 2 13

Referee's Decision LA-6934 4

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BRIEF OF RESPONDENT STATE OF CALIFORNIA IN OPPOSITION

OPINION BELOW

The order of the Court of Appeals for the Ninth Circuit is set forth in the transcript of record and the proceedings had before that court.

JURISDICTION

The order of the court of appeals granting motion by this respondent to dismiss appeal was entered

March 26, 1956. The petition for a writ of certiorari was filed June 25, 1956. The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

STATUTES INVOLVED

The pertinent portions of the California Unemployment Insurance Code (Statutes of 1953, Chapter 308, as amended) and the entirety of Section 1094.5 of the California Code of Civil Procedure, as amended, are set forth in the appendix hereto.

QUESTIONS PRESENTED

The questions presented in this proceeding are whether the district court, affirmed by the court of appeals, erred in:

1. Refusing federal judicial review of a final state administrative decision where the petitioner had not first exhausted state judicial review allowed by state law.

2. Denying jurisdiction in admiralty where the petitioner was in fact no longer a merchant seaman, but was engaged in air transport service.

3. Determining that the ninth cause of action involving the state respondent was fictitious and sham, where between the same parties as to the same subject matter in the same district court, the issue had been resolved adverse to the petitioner in an earlier proceeding.

STATEMENT OF THE CASE

The petition for writ of certiorari by the petitioner does not follow any particular pattern or form. Within the petition there are set forth without definite subdivision or demarcation, argument, conjecture, facts, etc. This type of petition is difficult to resist as it does not lend itself readily to rebuttal by phases or subdivisions. This respondent will seek to reconstruct the factual background for the benefit of this Honorable Supreme Court and the petitioner.

The petitioner seeks review of an order granting motion to dismiss an appeal in the Court of Appeals for the Ninth Circuit. In effect, the court of appeals affirmed a prior order of dismissal of the District Court for the Southern District of California, Central Division, there numbered 10961-WM.

The petitioner filed in the district court a proceeding in admiralty seeking judicial review in an original proceeding with reference to a final administrative decision by the California Unemployment Insurance Appeals Board and being numbered *Benefit Decision 18321, Case No. 26733. The Unemployment Insurance Appeals Board (hereinafter termed the State Appeals Board) denied unemployment insurance benefits to the petitioner (hereinafter termed Clinton) on the grounds that Clinton did not qualify for the receipt of unemployment insurance benefits with regard to the provisions of the California Unemployment Insurance Code. The State Appeals

* Set forth in the appendix to this brief.

Board affirmed a decision by a state referee (being numbered *Referee's Decision LA-6934) which held that Clinton was disqualified under the provisions of Section 1253(c) of the Unemployment Insurance Code in that he was not able to work and available for work when he filed a claim for state unemployment insurance benefits.

Each of Benefit Decision 18321 and Referee's Decision LA-6934 appear in the transcript of record now before this court.

Section 1094.5 of the California Code of Civil Procedure (set forth within the appendix herein) provides for state judicial review of a state final administrative decision by the institution of a proceeding in a state court. Before the state tribunal, there is produced the administrative record for examination and the determination of errors of law, if any, or of fact, if any. Clinton failed to invoke state judicial review in the trial or appellate courts of California. Clinton sought judicial review in an original proceeding in the district court with regard to the final state administrative decision.

Clinton in his proceeding in admiralty before the district court identified himself as a "seaman." Clinton in fact had ceased to work as a seaman and was engaged in air transport service. Following the termination of his air transport work, Clinton filed for state unemployment insurance, was denied the same, and thereafter exhausted state administrative

* Set forth in the appendix to this brief.

remedies. Clinton's last employment had been as an air transport worker.

The respondent State of California in No. 19061-WM moved to dismiss the ninth cause of action by Clinton. An amended proceeding in libel was filed by Clinton. The respondent State moved to dismiss the ninth cause of action in the amended proceeding in admiralty. Following noticed hearing, the district court granted the motion to dismiss by the State and entered an order of dismissal as to the ninth cause of action within the proceeding in admiralty. (The ninth cause of action alone named the State of California as a respondent.)

In the District Court for the Southern District of California, Central Division, in a proceeding there numbered 18837-WM, in admiralty, Clinton had named as a party respondent, the State of California, and had in No. 18837-WM sought judicial review in an original proceeding in connection with the denial of the same unemployment insurance benefits to Clinton by the State Appeals Board. In No. 18837-WM, the respondent State had moved to dismiss the proceeding as to the State because of a lack of jurisdiction in the district court over the subject matter of the proceeding and the person of the State respondent. Following noticed hearing, in No. 18837-WM, the district court entered an order of dismissal which became final. No appeal was perfected by Clinton from the order of dismissal by the district court in No. 18837-WM.

Following order of dismissal in No. 18837-WM, Clinton filed the proceeding in No. 19061-WM which was identical with the prior proceeding in No. 18837-WM, involving the same subject matter between the same parties, petitioner and respondent, in the same district court and the same judge.

On January 16, 1956, Clinton filed notice of appeal in No. 18837-WM from the district court to the Court of Appeals for the Ninth Circuit. This appeal was perfected by Clinton and a complete appellate record was developed before the court of appeals by Clinton and the respondent State of California, as to the ninth cause of action. Before the court of appeals, the state respondent filed a motion to dismiss the appeal on the ground that the State of California had never consented to be sued in the ninth cause of action in No. 19061-WM and that the district court had lacked jurisdiction over the person of the state respondent and the subject matter of the action. Further, it was urged to the court of appeals that the ninth cause of action was sham and fictitious and being a repetition of the previous proceeding in No. 18837-WM. Following noticed hearing, the court of appeals granted the motion of the state respondent and entered order granting motion to dismiss appeal.

SUMMARY OF ARGUMENT

Point A. The district court lacked jurisdiction over the purporting subject matter of the ninth cause of action within the proceeding as the State of California, or its state agencies or officers, cannot be

made a party without prior consent and which consent has not here been given.

Point B. The petitioner has not sought state judicial review of a state final administrative decision involving payment of unemployment insurance by the State of California and where the state has provided by statute for such judicial review.

Point C. The petitioner is not a merchant seaman as to the subject matter of the ninth cause of action. The district court properly held that there was no jurisdiction in admiralty as to the ninth cause.

Point D. The ninth cause of action is fictitious, groundless, and sham. The ninth cause is a repetition of a previous suit involving these same parties and the same subject matter in the same district court, there numbered 18837-WM, which was determined adverse to the petition Clinton.

ARGUMENT

Point A. The District Court Lacked Jurisdiction Over the Purporting Subject Matter of the Ninth Cause of Action Within the Proceeding as the State of California, or Its State Agencies or Officers, Cannot Be Made a Party Without Prior Consent and Which Consent Has Not Here Been Given.

A sovereign state without its consent cannot be made a party to an action in a federal district court and cannot be bound by any of the proceedings in said federal court. *Consent by the State is necessary to vest jurisdiction in a federal tribunal.* In the absence of state consent, there is no federal jurisdiction. *Duhne* v. *New Jersey* (1920), 251 U. S. 311, 64 L. Ed. 280.

In *Duhne* v. *New Jersey*, above, the court by Chief Justice White observed, p. 313:

> "It has been long since settled that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own State without its consent. Hans vs. Louisiana, 134 U. S. 1; North Carolina vs. Temple, 134 U. S. 22; California vs. Southern Pac. Co., 157 U. S. 229; Fitts vs. McGhee, 172 U. S. 516, 524."

At p. 314, the court in *Duhne* v. *New Jersey*, above, refers to:

> "the rule now so well settled as to be elementary that the federal jurisdiction does not embrace the power to entertain a suit brought against a state without its consent."

Clinton named the Director of Employment as a party respondent before the district court. It is clear that a suit against persons, as officers of a state, must affect them in their governmental capacities as state officials. To allow a suit to stand against state officers, in effect, tolerates a forbidden suit against the sovereign state to enforce alleged state liability. *Ford Motor Co.* v. *Department of Treasury*, 322 U. S. 721, 88 L. Ed. 1560; *Great Northern Life Ins. Co.* v. *Read, Inc. Com'r. of Oklahoma*, 322 U. S. 47, 88 L. Ed. 1121; *Worcester County Trust Company* v. *Riley, Controller of California*, 302 U. S. 292, 82 L. Ed. 268.

In the *Great Northern Life Ins. Co.* matter, above, the court held that an action against a state tax collector as an individual was in result one against the state as a sovereign and the action could not proceed against the state without its consent. In determining whether or not a state has consented to be sued, the federal court must consider the state administrative construction of its own statutes.

This court is aware, of course, that the constitutionality of the present California Unemployment Insurance Code (formerly known as the Unemployment Reserves Act) has been upheld in *Gillum* v. *Johnson* (1936), 7 Cal. (2) 744, 62 Pac. (2) 1037 (rehearing denied, 63 Pac. (2) 810). The constitutionality of state unemployment insurance legislation has been upheld in *Steward Machine Company* v. *Davis* (1937), 301 U. S. 548, 81 L. Ed. 1279; *Carmichael* v. *Southern Coal & Coke Co.* (1937), 301 U. S. 495, 81 L. Ed. 1245.

Point B. The Petitioner Has Not Sought State Judicial Review of a State Final Administrative Decision Involving Payment of Unemployment Insurance by the State of California and Where the State Has Provided by Statute for Such Judicial Review.

In *Alabama Public Service Comm.* v. *Southern Railway Co.* (1951), 341 U. S. 341, 95 L. Ed. 1002, this court in a unanimous decision determined that *where there is adequate state court review of an administrative order, based upon local factors, the intervention of a federal court is not necessary* for the

protection of alleged federal rights. Equitable relief may be granted only when the district court, in its sound discretion exercised with a "scrupulous regard for the rightful independence of State governments which should at all times actuate the federal courts" (p. 349) is convinced that an asserted federal right cannot be preserved except by granting the "extraordinary relief of an injunction in the federal courts" (p. 350). The usual rule of comity must govern between the federal and the state governments. *Alleged rights under state legislation are to be asserted first in state courts.*

Clinton has bypassed the California trial and appellate courts and has attempted prematurely, if at all, in this proceeding to gain federal judicial review simply for the asking and without any resort to state judicial tribunals. The *Alabama Commission* case, above, shows the reluctance of this Honorable Supreme Court to countenance federal judicial review in matters where available state court relief has not been sought.

In *Palmer Oil Corp.* v. *Amerada Petroleum Corp.* (1951), 342 U. S. 35, 96 L. Ed. 47, the court withheld review of an appeal involving the constitutionality of a state's statute, subsequently repealed and pending the state court's determination of the effect of the repeal. This shows the scrupulous regard by the federal courts to permit state courts to function first in the matter of interpretation and application of the state laws.

In *Dixon* v. *Duffy* (1951), 342 U. S. 33, 96 L. Ed. 46, on writ of certiorari to the Supreme Court of California to review a denial of writ of habeas corpus, the Supreme Court of the United States continued the matter in order that there might be first secured a determination from the California courts as to whether the California judgment involved the decision of an alleged federal claim. Again, we perceive the *scrupulous regard by the federal courts for the principle that state courts must first pass upon alleged federal involvement in the administration of state laws.* In the present case, this appellant although alleging action by state agencies prejudicial to the appellant has purposely avoided the state courts in this regard.

The appellant does not have a vested or contractual right to state unemployment insurance benefits. An unemployment insurance claim is not a right, privilege or immunity of a citizen of the United States. *Moore* v. *Bureau of Unemployment Compensation*, 73 Ohio Appeals, 362, 56 N. E. (2) 520; *Tally* v. *Unemployment Compensation Division*, 63 Ida. 644, 124 Pac. (2) 784; *Grossett Lumber Co.* v. *McGain* (Ark.), 170 S. W. (2) 674; *Snowden* v. *Hughes*, 321 U. S. 1, 88 L. Ed. 497; *Ashdown* v. *Department of Employment*, 135 Cal. (2) 291 (hearing denied by California Supreme Court, October 26, 1955).

Point C. The Petitioner Is Not a Merchant Seaman as to the Subject Matter of the Ninth Cause of Action. The District Court Properly Held That There Was No Jurisdiction in Admiralty as to the Ninth Cause.

Clinton at some indefinite time in the past has been a merchant seaman. Clinton argues from this circumstance that thereafter there is a permanent jurisdiction in admiralty in the district court over any and all matters in which Clinton may become a disputant. The record discloses that Clinton engaged in air transport service after he ceased to be a seaman. Clinton also had experience as an advertising solicitor. Clinton had secured a limited air navigator's license, but was not employed in California because of little demand for air navigators. Clinton was attending law school daily in the Los Angeles area. The state administrative agency denied unemployment insurance benefits to Clinton on the ground that he so restricted his availability for work *as an air transport navigator* that he was unavailable for work. None of the herein facts involves in any degree whatsoever Clinton as a merchant seaman. The district court properly held that as to the ninth cause of action, there was no admiralty jurisdiction as *Clinton was not a seaman* for any purpose of the denial of unemployment insurance benefits to him.

After Clinton terminated his merchant seaman service (and thereafter entered advertising and subsequently air transport service), he cannot conveniently claim to be a merchant seaman in civil disputes

in which he becomes involved as an air navigator. There is no contention that air transport navigation is within admiralty jurisdiction.

In *Standard Dredging Corporation* v. *Murphy*, (1943) 319 U. S. 306, 87 L. Ed. 1416, this court held that the application to maritime employers of a state unemployment insurance tax is not precluded by the provisions of Article 3, No. 2, of the Federal Constitution giving to federal courts exclusive admiralty jurisdiction. In a unanimous decision pronounced by Mr. Justice Black, this court rejected the contention that the New York Employment Insurance Law as applied to maritime employment is unconstitutional and that Congress had intended to exclude maritime employment from coverage by state unemployment insurance laws.

Even if a jurisdiction in admiralty should be found to exist in the district court in the herein dispute, the *Standard Dredging* decision, above, does not give to Clinton an immunity from resort to state courts in connection with state administrative decisions anent state unemployment insurance.

Point D. The Ninth Cause of Action Is Fictitious, Groundless, and Sham. The Ninth Cause Is a Repetition of a Previous Suit Involving These Same Parties and the Same Subject Matter in the Same District Court, There Numbered 18837-WM, Which Was Determined Adverse to the Petitioner Clinton.

Clinton first filed a proceeding involving these same parties and the same subject matter in the same court

and there numbered 18837-WM. This attempted proceeding in admiralty was dismissed as to the state respondent, following noticed hearing on motion to dismiss. Clinton did not appeal.

Subsequently, Clinton filed a new proceeding in admiralty as to the same subject matter, parties, and issues in the same district court and herein numbered 19061-WM. The second proceeding was essentially repetition of the first dismissed cause. The district court properly found that the second cause, No. 19061-WM, was fictitious and sham.

A court has the inherent power, even in the absence of any enabling statute, to dismiss or to stay perpetually, groundless, vexatious, annoying and harassing litigation. *Canha* v. *Anglo California National Bank of San Francisco* (Hearing denied in California Supreme Court, October 26, 1939), 34 Cal. App. (2) 383, 93 Pac. (2) 572.

The power to dismiss exists in all courts independent of statute. *People ex rel. Stone* v. *Jefferds* (1899), 126 Cal. 296, 58 Pac. 704; *Byer* v. *Arguello* (1949), 94 Cal. App. (2) 110.

The power to dismiss was formerly exercised by courts of chancery. Later dismissal was exercised in the law courts: 6 Am. Eng. Ency. of Pl. Pr. 910; 9 Cal. Jur. 505. In the courts of law and of chancery, dismissal was exercised when it was shown that an action was fictitious or sham: 49 C. J. 701; 18 C. J. 1180. The same rules apply to a dismissal at law or in

equity under code procedure: 6 Am. Eng. Ency. Pl. Pr. 910.

Dismissal is mandatory where the issues presented have previously been adjudicated in another action between the same parties. *Rishel* v. *McPherson County*, 34 Fed. (2) 250, certiorari denied 281 U. S. 727, 74 L. Ed. 1144.

An action may be dismissed as vexatious where it is brought after dismissal of a former action for the same relief. (*Weidenfeld* v. *Pacific Improvement Co.*, 101 Fed. (2) 699.)

The district court concluded with reason that at some point of time this repetitive litigation must cease.

In *Crowley* v. *Modern Faucet Mfg. Co.*, (1955) 44 Cal. (2) 321, 282 Pac. (2) 33 it is held that it is not an abuse of discretion by a trial court to dismiss an action on the ground that it is sham and frivolous where the same plaintiff was given leave to amend after his first amended complaint and declined to do so and filed a new action to relitigate the same issue. The second suit is sham and frivolous as the plaintiff should have persevered in the first suit.

By analogy to *Crowley*, above, Clinton's remedy was appeal to this court in No. 18837-WM after dismissal in the lower court. In failing to perfect an appeal, Clinton followed a sham procedure as to the State in filing the herein proceeding with the district court.

CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this court and that the petition for a writ of certiorari should be denied.

Dated: This tenth day of August 1956.

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